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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-693

GENERAL FOODS CORPORATION, *Petitioner*,

v.

WILLIAM E. GREENE, d/b/a
WILLIAM E. GREENE FOOD DISTRIBUTORS, *Respondent*.

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*On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit*

BRIEF IN OPPOSITION

E. C. DEENO KITCHEN
of the Law Firm of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, Florida 32302

and

WILLIAM VANDERCREEK
2605 Republic Bank Tower
Dallas, Texas 75201

Counsel for Respondent Greene

INDEX

TABLE OF AUTHORITIES

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QUESTIONS PRESENTED

1. Whether various agreements and arrangements between (a) General Foods Corporation (the manufacturer), (b) independent distributors of General Foods such as Greene (the reseller), and (c) certain institutional food accounts, *e.g.* restaurants, hotels, cafeterias, that were designated by General Foods as Multiple Food Service Accounts or MFSAs (the consuming account or ultimate purchaser), constitute vertical price fixing under Section 1 of the Sherman Act where General Foods requires the independent distributor to resell and deliver the General Food brand products he owns, possesses, and has previously purchased from General Foods to the MFSA at the prices set and determined by General Foods pursuant to its agreements with the MFSA.

2. Whether an independent distributor, Respondent—Greene, who, in accordance with his contractual obligation to General Foods, participated as a relative minor part of a vast system of distribution that included an illegal price fixing scheme which was devised and controlled by General Foods and in which the distributor Greene had no role in developing or promulgating, should be totally barred under *in pari delecto* from recovery of damages suffered as result of the price fixing scheme and the wrongful termination for refusing to adhere to such scheme.

STATEMENT OF THE CASE

With deference, the Respondent does not accept the Statement of the Case by the Petitioner because it mistates or omits certain facts contrary to the jury verdict and record.

The Respondent William E. Greene Food Distributors, a sole proprietorship, obtained a damage judgment upon a jury verdict against Petitioner General Foods Corporation for violation of Section 1 of the Sherman Anti-trust Act. The basis was resale price maintenance (vertical price fixing).

Until his termination by General Foods on January 5, 1971, Greene was an independent distributor of General Foods products as per a distributorship agreement entered into by the parties on August 13, 1958. (App. 12)* Greene was *not* an employee of General Foods (App. 28). He had been a private distributor for General Foods for over twenty years and at the request of General Foods, had moved to Tallahassee, Florida in 1954, to purchase the local General Foods distributorship (App. 33).

By the terms of the distributorship agreement, Greene

* Reference to Record are to the Appendix printed below or, if not in Appendix, to the transcript, Tr, of the trial.

resold General Foods products in Florida and Alabama to what is referred to in the trade as institutional food accounts, *i.e.*, hotels, restaurants and cafeterias—the away from home market—as distinguished from grocery stores and super markets (App. 21-22, 29). Greene also distributed food products of manufacturers other than General Foods (App. 30-31).

During the period of time Greene was a General Foods distributor, General Foods entered into contractual agreements with certain institutional accounts known as Multiple Food Service Accounts (hereinafter MFSA or MFSAs). Through these agreements, various MFSAs acquired the right to purchase coffee and non-coffee products from Greene at prices agreed upon between General Foods and the MFSA accounts (App. 29). The MFSA account, however, was not obligated to purchase any General Foods brand products from Greene or any other private distributor (App. 38, tr. June 28, 1973, p. 210-11). The MFSA designation did not constitute an order for any coffee or non-coffee products. Admittedly the agreements between General Foods and the MFSA constituted strictly a right to purchase through a private distributor such as Respondent Greene at a set price (TR, June 28, 1973, p. 81). Although MFSA accounts did include national chains such as Holiday Inn, they also included locally-owned businesses with more than one retail outlet (TR, June 27, 1973, Vol. II, p. 45). Businesses which were not designated MFSA were referred to as *"down the street"* accounts (App. 35-36). Greene was free to resell General Foods products to down the street (DTS) accounts at a price of Greene's own choosing and on his own invoice (App. 39-40). Many businesses which Greene had sold as his own down the street customers were subsequently designated as MFSAs by General Foods (App. 67).

There was no distinction in the manner in which Greene and his salesmen solicited and made sales of their

products to MFSAs and down the street accounts (App. 37-38). The coffee and non-coffee products, which could be purchased by MFSA accounts at the agreed upon price, as well as products which could be purchased by down the street customers, were all products previously purchased by Greene from General Foods and to which Greene held title and stored in his Tallahassee warehouse at his risk of loss (App. 29, 36). All of the products ordered by Greene from General Foods were paid for on the basis of a National Distributors Price List set by General Foods (App. 29). At the time of any purchase from General Foods, Greene did not identify whether his order would be resold to MFSAs or down the street accounts (App. 30).

The Petition for Certiorari predicates its argument on conflict that Greene was an employee and there was no resale by Greene to MFSAs. (Pet. for Cert. p. 9) It was stipulated that Greene was a distributor (App. 28). No issue of Greene being an employee was raised at pre-trial, and such was not included in any requested charge (App. 251) as indicated in the Petition for Certiorari. General Foods officers readily acknowledged at trial that it marketed through "independent coffee resalers or distributors" (Tr. June 28, 1973, p. 209). General Foods personnel unequivocably testified that a distributor such as Greene was to "*sell*" coffee he had purchased from General Foods to MFSAs (App. 78; tr. June 27, 1973, Vol II p. 31). Under his distributorship agreement with General Foods, Greene was to resell his coffee and non-coffee products to MFSAs utilizing MFSA invoice form sets[1] and at the prices agreed upon between the

[1] The use of special invoice form sets for MFSA accounts, which reflected the price set and allowances made by General Foods to MFSA accounts, enabled General Foods to insure that distributors such as Greene complied with its pricing agreements. Under this procedure the MFSA account (unless otherwise instructed) would remit payment directly to General Foods (App. 29). Greene, by use of the distributor's copy of the invoice, could receive credit on other orders from General

MFSA account and General Foods (App. 123). The jury was instructed to find liability if there was an "agreement between General Foods and by MFSA accounts which fixed or set the price at which the plaintiff Greene *was to resell* commodities that Greene owned and had purchased from General Foods . . ." (Tr. June 29, 1973, oral charge, p. 4 emphasis added). The jury so found.

On an MFSA coffee transaction Greene's margin was the difference between the distributor price list and the MFSA price list (usually six cents a pound) plus a delivery allowance of 2, 3 or 4 cents a pound depending upon the number of cases sold. Under the MFSA program, certain MFSAs, by agreement with General Foods, were entitled to additional discounts from the MFSA price list on coffee products known as "EQA" (Earned Quantity Allowance); and private distributors, as determined by General Foods, would receive discounts from the distributor price list on coffee products known as GOA (Growth Opportunity Allowance). (App. 29-30, 52-53, 86-91).

General Foods states at p. 6 of the Petition that it requested an *in pari delecto* charge: "that Greene would not be entitled to recover damages if he *had helped develop* [and freely participated in the scheme] . . ." The phrase "had helped develop" was not included in charge requested, nor was it an issue raised. No evidence was introduced that Greene helped develop the MFSA program. That the MFSA program was controlled by General Foods is without contradiction in the record (*e.g.* tr. June 27, 1973, Vol II, pp. 44-68). Greene was not a party to, and had no role in determining which accounts

Foods (whether orders for resale MFSA accounts or down the street accounts), or even cash from General Foods (App. 30). With respect to risk of credit on MFSAs, some, as determined by General Foods, were required to pay on a cash basis (TR, June 27, 1973, Vol. II p. 52). In such event the distributor was instructed to obtain cash from the MFSA in the amount set forth on the MFSA form set invoice.

would be designated MFSA, or at what prices the MFSA accounts would be allowed to purchase his products. This was accomplished solely by General Foods (App. 30). Greene had no role in determining the amounts of the distributor price list (App. 30). Greene was obligated to sell and service the MFSA accounts in accordance with prescribed procedures and policies that were formulated by General Foods (App. 20, 78). General Foods and Greene were never claimed to be equals. General Foods is the largest processor and marketer of coffee in the United States (App. 31). Greene was one of approximately 160 independent distributors of the Institutional Food Service Division of General Foods. (Tr. June 28, 1973, p. 209). The trial court ruled that the defense of *in pari delecto* was not applicable to the Greene situation.

General Foods in its Petition to this Court states that Greene was terminated for "violations of the express provisions of the agreement." (Pet. for Cert. p. 5). Unless General Foods has reference to the agreement provisions which were to implement the illegal price fixing, the statement is contrary to the record and verdict. Pursuant to request by General Foods, the District Court instructed the jury that General Foods could terminate with or without cause and that Greene had the burden of proof to establish that the termination was due to price fixing in order for Greene to receive any future damages for loss of profits (R-858, 859). The jury by its verdict rejected General Foods asserted reason for termination and found that Greene's termination had been the result of his refusal to comply with General Foods' illegal price fixing scheme. Prior to the termination of Greene's distributorship agreement by General Foods, Greene complained to General Foods of low profit on sales to MFSAs. In order to stay in business, Greene was forced to charge his down the street customers a higher price for his products, even though many down the street customers ordered from Greene in a quantity greater than many MFSA accounts

(TR, June 28, 1973, pp. 69, 70, 71). Although Greene had at times resold General Foods products to MFSA accounts on his own invoice and at his own price (which resulted in greater profit for Greene) General Foods made him stop (App. 42). Greene had wanted to resell to all of his customers at similar prices (TR, June 28, 1973, pp. 69, 70).

Greene as an alternative explored selling out. Indeed, for a year prior to termination, Greene was negotiating with General Foods for the purchase of his distributorship (App. 31). At one time General Foods had a policy of buying its private distributorships and operating as company owned, but later recognized that it "would make more money when we sell our coffee through independent distributors . . ." (Tr. June 28, 1973, p. 219). During this period of negotiation to purchase Greene's Distributorship, and prior to termination, General Foods, however, was secretly investigating Greene as being a "defector" including his deviation from pricing to MFSAs.[2]

---

[2] "Q Prior to telling Mr. Greene anything about the termination or possible termination which occurred on December 31, 1970, and while he was waiting for his offer to buy, were you secretly investigating him for being a defector?
A Yes. (App. 119).

* * *

Q And the MFSA program is to sell brands of General Foods Coffee on MFSA prices?
A He is to execute deliveries to MFSA accounts which have been set up by General Foods.
Q On MFSA prices?
A On MFSA form sets with MFSA prices.
Q And if he doesn't do that then he is a defector under the terminology?
A Yes." (App. 123)

Greene's Exhibit B-32, A General Foods memorandum provides, in part:

"Ben, confidentially, we are under the opinion that the William E. Greene distributorship has increased coffee above and beyond

On December 24, 1970, the District Manager told Greene that General Foods would make him an offer to buy his private distributorship. However, on December 21, 1970 the District Manager had complained to a superior officer of General Foods about Greene's failure to follow published prices in sales to MFSAs, the selling of MFSAs on Greene's own invoice at Greene's own price, and Greene's general disdain to follow the required price lists.[3] Thus 10 days later, on December 31, 1970, General Foods, instead of making an offer to buy Greene out, terminated Greene effective January 5, 1971. Greene, who had been a private distributor for approximately 24 years, was given five days' notice. General Foods, as a part of its negotiations to buy Greene out, had obtained a list of all accounts serviced and sold by Greene, including his down the street accounts; it then commenced its own sales operation in Tallahassee through a company branch.

The instructions given the jury by the trial Court on both the issues of liability and of damages were not objected to by General Foods. The trial court generally

Footnote 2 cont'd.

the 2 cents per pound to the MFSA accounts he services. Is it possible for you to check a few of his MFSA tickets with regard to the coffee prices as currently published. I would suggest checking from 10/6 onward. I would appreciate it if you would be of help in this situation."

Greene's Exhibit B-58, a General Foods memorandum states in part:

"It may, in fa[illegible], be the case of one Holiday Inn where Mr. Greene was selling at his down-the-street pricing which was considerably higher than competition and Holiday Inn is an approved MFSA account . . ."

[3] ". . . When our customers complain about prices he cries no price list. Send him a price list and later try to get him to refer to it and he pulls the whole pile out of a bottom drawer." Greene's Exhibit B-50, App. 127.

instructed the jury as to price fixing under Section 1 of the Sherman Act and specifically in the context of the facts in the case at bar. All of the evidence at trial related to products Greene had purchased for resale and the trial court did not give an instruction requested by General Foods that would have mandated no liability based upon whether Greene made "deliveries" to MFSAs without consideration of whether Greene resold products he had purchased from General Foods. (App. 251). The trial court ruled that the defense of *in pari delecto* as urged by General Foods was inapplicable to Greene's case. (App. 252).

The trial court denied the Motion of General Foods for a directed verdict. The jury returned the verdict for Respondent—Greene. The trial court entered an order denying the post trial motions of General Foods and entered Judgment in favor of Greene. An Appeal was duly perfected to United States Court of Appeals for the Fifth Circuit which affirmed with full opinion. 517 F.2d 635. The Petition for Certiorari was timely filed.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Decision below affirming a jury verdict of price fixing under the Sherman Act does not conflict with decisions of other Circuits nor of this Court.

The Petition for Certiorari asserts that the decision below is in "sharp conflict with decisions of the Third and Tenth Circuits" and "misinterpreted and misapplied" *Simpson v. Union Oil Co.*, 377 U.S. 13. (Pet. on Cert. 7) There is no conflict by the decision below with either the holdings or principles of the referenced cases.

The Third and Tenth Circuit cases, *Goldinger v. Boron Oil Co.*, 375 F.Supp 400 (W.D. Pa 1974), aff'd without opinion (3d Cir. Mar 7, 1975), cert. denied U.S. (October 6, 1975) and *American Oil Co. v. McMullin*, 508

F.2d 1345 (10th Cir 1975), both were predicated first upon fact determinations that the respective antitrust claimants were in substance employees for Sherman Act purposes and second, legal determinations that certain antitrust actions including price fixing did not lie on the basis of an employee-employer combination or conspiracy. The products involved were owned by the "employer." In this case there was no defense by General Foods claiming that Greene was an employee. Besides the stipulation that Greene was a distributor (App. 28), the evidence, including that from General Foods personnel, was that Greene was an *independent* distributor. The fact and legal questions involved in *Goldinger* and *American Oil* are not presented in this case. Whether or not the decisions of the Third and Tenth Circuits were correctly or incorrectly decided would not be a basis for either reversing or affirming the case at bar.

Indeed, both the *American Oil* and *Goldinger* decisions expressly acknowledge the special facts involved as the basis for distinguishing *Simpson v. Union Oil,* 377 U.S. 13. In *American Oil,* the claimant was found to be both an independent businessman who resold petroleum products at a retail truck stop and service center, and, in addition, he was found to as an employee of American in reference to bulk sales *of products owned by American* to other oil companies as consumers. Indeed, *American* had previously purchased the bulk plant operations from an independent owner who had been "free to set both his wholesale distribution prices and his retail prices." 508 F.2d at 1346. McMullin was hired as an employee for such bulk operations. The Tenth Circuit was careful to distinguish the pertinent facts from *Simpson.*[4] So was the court in *Goldinger, see* 375 F.Supp at 404.

[4] "But it must be emphasized that the dealer involved in the Simpson case was in most respects an independent businessman, and the Court found that the consignment arrangement existed only for the purpose of controlling retail prices." 508 F.2d at 1351

* * *

"We find nothing in Simpson which would prohibit a manufacturer from distributing its own products and thereby controlling wholesale distribution prices." 508 F.2d at 1352.

As previously stated, Greene's operation was not divided into wholesale and retail segments; there was only one distributorship contract and General Foods recognized Greene at all times as an independent distributor; Greene solicited sales to MFSAs and down the streets in same manner; many of Greene's DTS were later designated as MFSAs by General Foods; some DTS ordered in greater volume from Greene than some MFSAs; all of the products sold were previously purchased by Greene from General Foods without designation as for resale to MFSAs or DTS; and prior to delivery Greene owned and had possession of the property at his own risk in own warehouse. The difference was: (a) Greene resold to DTS on his own ticket or invoice at a price determined by Greene; and (b) Greene resold to MFSAs on the special invoice at the price set by General Foods.

The MFSA invoice was a three party document within the vertical line of distribution among (1) the manufacturer and processor (General Foods) (2) the private distributor (Greene) and (3) the consumer (the MFSA) which, in violation of 15 U.S.C. Section 1, resulted in the resale of the goods in question from the individual private distributor to the MFSA at the agreed or fixed price, with the allocation of the cost and profit between the three levels of vertical distribution in accordance with General Foods MFSA program.

The Petition for Certiorari in discussing what is labeled the "crucial question" states: "Insofar as MFSA accounts are concerned, it is clear that he [Greene] acted as agent for General Foods. By hypothesis there can be no 'resale

price maintenance' *unless there has been a resale by an independent distributor*. Put another way, there is nothing illegal about a manufacturer setting the price at which it will sell its goods to its own customers." (Pet. for Cert. p. 9, emphasis added). In what charitably could be referred to as an oversight, General Foods neglects to tell this Court that the very facts relied upon for its hypothesis (who made the resale with whose products) were submitted to the jury and resolved against General Foods.

In an instruction to which neither party objected the trial court charged:

> "If you find from a greater weight of the evidence in this case that there was an agreement between General Foods and any MFSA accounts which fixed or set the price at which the plaintiff Greene was to resell commodities that Greene owned and had purchased from General Foods, then this is a violation of the anti-trust act and you should so find."

The jury found liability. There is more than ample evidence to support such verdict not only from the plaintiff—Greene, but from General Foods documents and stipulations (App. 28-31) and testimony from its officers:

"Q What was the distributor's obligation in reference to MFSA accounts?
A To sell Maxwell House Coffee to them. (Tr. June 27, 1973, Vol. II p. 31).

* * *

Q Who owns the coffee that is given to the MFSA accounts at the time the distributor physically takes it over and gives it to say Holiday Inn?
A The distributor would own the coffee.
Q So it would be his coffee that he is selling?
A That's correct. (Tr. June 27, 1973, Vol. II p. 32).

* * * * * *

Q Now, Mr. Greene is a private distributor, is that right?
A Independent distributor. (App. 77)

* * *

Q Mr. Greene, under his contract as distributor of General Foods, is obligated to service the MFSA accounts in accordance with the prescribed procedures, is that correct?
A Yes.
Q Who formulated those prescribed procedures?
A General Foods.
Q Is part of his duty to sell coffee that he has purchased from General Foods to the MFSA accounts?
A Yes, sir.
Q Is he to call on those accounts for the purposes of obtaining orders or his salesmen?
A Yes, sir.
Q Now, is he given any price in which he is to sell those MFSA accounts at when he is to call on them?
A You are talking about coffee and food, yes, sir, General Foods products, yes.
Q And that is called the MFSA price list?
A Yes. (App. 78).

General Foods also argued that the Court below misapplied *Simpson v. Union Oil*, 377 U.S. 13. *Simpson* condemned a price fixing scheme *even though* the Oil Company held technical legal title by consignment of the products being sold. In the case at bar, Greene had title, owned, possessed, and controlled the products at his own warehouse; there was no consignment. Until General Foods present argument, no one has construed *Simpson* to mean that a manufacturer who sells goods to a distributor and who sets the price for resale is immune from price fixing because there was no consignment device. Vertical price fixing is illegal price fixing whether accomplished via a pretext of consignment to the reseller or blatantly

via an actual transfer of ownership to the reseller, as this Court has ruled on frequent occasions. See, *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707; *United States v. Parker, Davis & Co.*, 362 U.S. 29; *Simpson v. Union Oil*, 377 U.S. 13; and *Albrecht v. Herald*, 390 U.S. 145. There is no conflict.

B. Decision below does not conflict with Perma Life Mufflers on in pari delicto.

General Foods sought total immunity from all antitrust liability predicated upon Greene's participation as an independent distributor in reselling products to MFSAs. The trial court ruled that under the principles of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 329 U.S. 134, that the defense of *in pari delicto* based upon voluntary participation should not bar Greene's case. Although the plurality opinions in *Perma Life* reflect that the defense could have vitality when the conspiracy participants are equally culpable in the formulating and implementing of the scheme and when it was not thrust upon claimant, the stipulated and admitted facts, together with uncontroverted evidence from General Foods' records and personnel, do not present such questions in the case at bar. It was stipulated or expressly admitted by General Foods as follows:

> The coffee and non-coffee food items that Greene sold to the MFSA accounts and the coffee and non-coffee food items sold to non-MFSA accounts were acquired by Greene from General Foods under a national distributor price list that was determined by General Foods less the applicable GOA allowance on coffee items. (Stipulation, App. 30)
>
> Greene had no role in determining the amounts of the distributor price list. (Stipulation, App. 30)
>
> The MFSA Price List controls the purchase price of an item purchased by an MFSA account of General Foods Corporation whether ordered directly to General Foods Corporation or through a privately owned distributor of General Foods Corporation. (Admission by General Foods, published Tr, June 28, 1973, p. 78)
>
> Greene was not a party to and had no role in determining which accounts would be MFSA accounts, nor the amount of the EQA for MFSA accounts, nor the amounts of MFSA price list. (Stipulation, App. 30)
>
> MFSA accounts of General Foods Corporation are authorized to order coffee from privately owned distributors of General Foods Corporation with the base purchase price controlled by the MFSA price lists promulgated at the home office of General Foods Corporation in White Plains, New York. (Admission by General Foods, published Tr, June 28, 1973, p. 78)

The Distributor Contract and the GOA manuals both required an independent distributor such as Greene to follow the General Foods prescribed procedure in handling MFSA accounts. Detailed instructions by General Foods were supplied as to invoice use and price. That Greene was to follow the MFSA policies promulgated by General Foods was admitted in testimony of General Food personnel. Certainly this case does not match equals—the largest coffee processor in the United States with gross sales in excess of 2 billion *versus* Greene, one of General Foods 160 "independent" coffee resalers.

In vertical price fixing situations it is the small independent distributor who is the real victim when he is not allowed to set his prices. As analogous to Greene see *Simpson v. Union Oil*, 377 U.S. 13 at 20. The manufacturer's profit motives are predicated on the over-all system. As noted, General Foods freely and openly acknowledged that it prefers distribution through independent resalers or distributors because this is more

profitable for General Foods (especially when it controls the resale price). The illegal MFSA program was adopted by General Foods, which sold primarily through independent distributors, so "it" could compete with coffee roasters that sold direct and not through independent distributors. (Tr. June 28, 1973, p. 209). The MFSA scheme was not adopted by or for Greene. If General Foods wants to use independent distributors, it must forego price fixing on resale. It can not have its cake and eat it too.

The public policy of the United States has consistently recognized the importance of private suits to enforce the anti-trust laws of the United States. This is particularly true in the case at bar where the plaintiff did not have the benefit of trailing a successful government suit with it attending establishment of a prima facie case. Greene was terminated on December 31, 1970 and even though the case has moved expeditiously for a private action, it will be 1976 before this Court can even rule on the Petition for Certiorari. Even though the strong policy in favor, very few private plaintiffs ever successfully run the full gauntlet of the entire litigation process against the able and adroit opposition that is mounted. If small distributors, who are the victims, are barred under *in pari delecto,* private vertical enforcement of price fixing cases would be curtailed.

The problem of the independent distributor who is a small part of a vast distribution system that is controlled by the manufacturer is well illustrated here. If he participates, the manufacturer claims immunity. If he does not participate, the manufacturer terminates the distributor, and claims immunity anyway because the distributor had previously participated. Moreover, because very few manufacturers will advise distributors that the system is illegal, if the distributor trusts the manufacturer, he loses. If the distributor guesses wrong on how the courts will rule, he also, of course, loses. This court recognized in *Perma Life Mufflers,* that *pari delecto* is not

a safe haven for instigators and enforcers of antitrust violations. Considering Greene was terminated for not adhering to General Foods' illegal MFSA program, the defense of *in pari delecto* as a total bar particularly does not set well.

CONCLUSION

Under the facts found by the jury and the undisputed facts in the record, the decision below does not conflict with the holdings or principles of decisions of other Circuits or of this Court. Indeed the opinion below is fully in accord with the most recent decisions of this Court. The Writ should be Denied.

Respectfully submitted,

E. C. DEENO KITCHEN
of the Law Firm of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, Florida 32302

and

WILLIAM VANDERCREEK
2605 Republic Bank Tower
Dallas, Texas 75201

Counsel for Respondent Greene